87-1492

Supreme Court, U.S.
FILED
MAR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARSHALL SPIEGEL,

Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO and LEONARD A. NELSON, as appointed *GUARDIAN AD LITEM,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MARSHALL SPIEGEL
5701 North Sheridan Road
Chicago, Illinois 60660
(312) 878-0993
Pro Se Petitioner

QUESTIONS PRESENTED

Whether the trial court's and the Respondent guardian *ad litem*'s undisclosed loans at Respondents' bank presented such a conflict of interest and such an appearance of impropriety that the Petitioner's Fourteenth Amendment Due Process rights were violated.

Whether the awarding of guardian *ad litem* fees for work performed not in the ordinary course of a guardian *ad litem*'s duties and which was contrary to statute was an unlawful taking of property under the Due Process Clause of the Fourteenth Amendment.

Should the rights of those who are non-existent be so substantial and broad that they should be afforded property protection through appointment of a guardian *ad litem* while under current law protection of the existing but unborn is restrained.

LIST OF PARTIES

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO and LEONARD A. NELSON, as appointed *GUARDIAN AD LITEM,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Marshall Spiegel, individually, respectfully prays that a writ of certiorari issue to review the October 7, 1987 judgment of the Supreme Court of Illinois.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First Judicial District [154 Ill. App. 3d 450, 507 N.E.2d 58, 107 Ill. Dec. 394] is set forth in the Appendix. The order of the Supreme Court of Illinois denying leave to appeal [116 Ill. 2d 550] is also set forth in the Appendix.

JURISDICTION

The Illinois Supreme Court denied leave to appeal on October 7, 1987. On December 24, 1987, this Court granted Petitioner an extension of time within which to file this petition until March 5, 1988. (U.S. Supreme Court Order No. A-492). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

CHAPTER 110—CODE OF CIVIL PROCEDURE

2-413. Unknown parties

§ 2-413. Unknown parties. If in any action there are persons interested therein whose names are unknown, it shall be lawful to make them parties to the action by the name and description of unknown owners, or unknown heirs or devisees of any deceased person, who may have been interested in the subject matter of the action previous to his or her death; but an affidavit shall be filed by the party desiring to make those persons parties stating that their names are unknown. Process may then issue and publication may be had against those persons by the name and description so given, and judgments rendered in respect to them shall be of the same effect as though they had been designated by their proper names. If there has been a person who may have been interested in the action, and upon diligent inquiry it cannot be ascertained whether the person is living or dead, it shall be lawful to make those persons who would be his or her heirs and devisees parties defendant as unknown owners, the same as if he or she were known to be dead, but in all those cases an affidavit shall be filed by the party desiring to

make any unknown persons who would be the heirs or devisees of the person not known to be living or dead parties, stating that upon due and diligent inquiry it cannot be ascertained whether or not the person is living or dead and further stating that the names of the persons who would be his or her heirs or devisees are unknown. Process may then issue and publication may be had against all parties by the name and description of unknown owners, and judgments rendered in respect to the unknown parties shall be of the same effect as though they had been designated by their proper names. Only one affidavit is necessary under the provisions of this section for the purpose of making persons described herein parties to the action.

2-415. Appointment of and actions against receivers

§ 2-415. Appointment of and actions against receivers. (a) Before any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court may order and with security to be approved by the court conditioned to pay all damages including reasonable attorneys fees sustained by reason of the appointment and acts of such receiver, in case the appointment of such receiver is revoked or set aside. Bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of the opinion that a receiver ought to be appointed without such bond.

(b) On an application for the appointment of a receiver, the court may, in lieu of appointing a receiver, permit the party in possession to retain such possession upon giving bond with such penalty and with such security and upon such condition as the court may order and approve; and the court may remove a receiver and restore the property to the possession of the party from whom it was taken upon the giving of a like bond.

(c) Every receiver of any property appointed by any court of this State may be sued in respect of any act or

transaction of the receiver in carrying on the business connected with the property, without the previous leave of the court in which the receiver was appointed; but the action shall be subject to the jurisdiction of the court in which the receiver was appointed, so far as the same is necessary to the ends of justice.

2-501. Guardian for persons not in being

§ 2-501. Guardian for persons not in being. In any action, whether a trust is involved or not, any person or persons not in being are or may become entitled to, or may upon coming into being claim to be entitled to, any future interest, legal or equitable, whether arising by way of remainder, reversion, possibility of reverter, executory devise, upon the happening of a condition subsequent, or otherwise, in any property, real or personal, involved in such action, the court may, whenever it may deem it necessary for the proper and complete determination of such cause, appoint some competent and disinterested person as guardian ad litem of such person or persons not in being; and any judgment or order entered in such action shall be as binding and effectual for all purposes as though such person or persons were in being and were parties to such action. By such appointment, the person so appointed guardian ad litem, shall not be rendered liable to pay costs of the action; and shall be allowed a reasonable fee for the services as such guardian, to be fixed by the court.

2-502. Guardians for minors

§ 2-502. Guardians for minors. Guardianships for minors shall be governed by Section 11-13 of the "Probate Act of 1975", as amended.[1]

[1] Chapter 110½, ¶ 11-13.

STATEMENT OF THE CASE

Petitioner, Marshall C. Spiegel is a trustee and the sole income beneficiary of the Oscar Spiegel Insurance Trust Agreement ("Spiegel Trust"). Respondent, the Continental Illinois National Bank and Trust Company of Chicago ("Continental"), was formerly a corporate trustee of the Spiegel Trust. And Respondent Leonard Nelson ("Nelson") was formerly the guardian *ad litem* of Spiegel's unborn children in this case.

The Spiegel Trust was created in 1972 by Spiegel's father, Oscar Spiegel. In 1973, Oscar Spiegel died, and Continental was appointed as a trustee. Since Oscar Spiegel's death, Petitioner who is unmarried has been the sole income beneficiary of the Spiegel Trust.

On Petitioner's twenty-fifth birthday, he became an additional trustee of the Spiegel Trust. At that time, he attempted to remove Continental as co-trustee.

Continental then sued Petitioner in an "interpleader" action, seeking a finding that the Spiegel Trust required the appointment of a corporate trustee. The case was placed on the calendar of Judge Reginald Holzer of the Circuit Court of Cook County, Illinois. On April 16, 1982, on the Bank's motion, Judge Holzer appointed Kenneth Prince as guardian *ad litem* of Petitioner's unborn children. Leonard Nelson, a member of Prince's law firm, worked with Prince on this case.

On August 2, 1982, Petitioner filed a counterclaim alleging that Continental had breached its fiduciary duty to Petitioner and other trust beneficiaries by placing trust assets in non-interest bearing accounts with its own banking company. On September 9, 1982, Prince moved for

judgment on the pleadings, asserting Continental's position that the Spiegel Trust required the appointment of a corporate trustee. Judge Holzer granted Prince's motion for judgment. On the same day, Prince presented his petition for fees to Judge Holzer. On November 16, 1982, fees were awarded to Prince's former law firm for work in this case. On December 20, 1982, Nelson was appointed to be the new guardian *ad litem* for Petitioner's unborn children.

Petitioner appealed from the orders construing the trust agreement and awarding fees. On December 7, 1983, the Appellate Court of Illinois, First Judicial District affirmed those orders.

On remand after the first appeal, Nelson petitioned Judge Holzer for additional fees for work done on the appeal. On September 6, 1984, Judge Holzer granted additional fees to Nelson.

On September 12, 1985, a second appeal was taken from the award of the additional fees for work performed on the first appeal. On April 10, 1985, the Appellate Court of Illinois affirmed the award of fees to Nelson. Shortly after the second appeal was decided, Judge Holzer was indicted by a federal grand jury on multiple counts of extortion, mail fraud and racketeering. (*See attached, U.S. v. Holzer,* 816 F.2d 304 (7th Cir. 1987), *vacated and remanded,* ____ U.S. ____, 108 S.Ct. 53 [1987]).

On December 10, 1985, Nelson filed a petition for additional fees for work done on the second appeal. Prior to that time, neither Continental, Judge Holzer, Prince nor Nelson had disclosed that all of those individuals were indebted to Continental. After Nelson's fee petition was filed, Petitioner took Nelson's deposition and discovered that Nelson had a loan from Continental.

On January 24, 1986, Petitioner filed objections to Nelson's petition for fees. Petitioner objected to Nelson's petition for fees on the grounds that Nelson had just revealed in deposition that he was indebted to Continental, that it was unethical for Nelson to have the appointment without disclosing his indebtedness to Continental; that Nelson had an undisclosed conflict of interest; and that Nelson was seeking fees for work performed for his own benefit, and not for the benefit of the unborn beneficiaries.

Petitioner also moved to vacate all of the orders which had been entered by Judge Holzer on the grounds that Judge Holzer had loans from Continental which had never been disclosed, and that he should have recused himself from the case.

Judge Marovich who had taken jurisdiction over the case from the indicted Judge Holzer rejected Petitioner's contention that Nelson was required to disclose his loans from Continental. Judge Marovich then also awarded fees to Nelson. Judge Marovich expressly found that the fees were being awarded to Nelson for his work in recovering a prior fee award and not for any services to the unborn beneficiaries. On February 11, 1986, Petitioner moved for reconsideration of the award of fees to Nelson.

On March 11, 1986, Judge Marovich denied Petitioner's request for reconsideration of the order on Nelson's fees. Judge Marovich did amend his prior order to the extent that he assessed the attorney's fees against Petitioner personally. Judge Marovich also denied Spiegel's motion to vacate all of Judge Holzer's orders.

On April 3, 1986, Petitioner filed a timely Notice of Appeal, appealing from the denial of the motion to vacate Judge Holzer's orders and the assessment of Nelson's at-

torney's fees against Petitioner. On March 18, 1987, the Illinois Appellate Court again ruled in Respondents' favor and upheld the trial court's orders. *Continental Illinois National Bank and Trust Company of Chicago v. Marshall Spiegel*, 154 Ill. App. 3d 450, 507 N.E.2d 58 (1st Dist. 1987), *cert. denied*, 116 Ill. 2d 550 (1987). (*See attached copy*). In September, 1987, the Supreme Court of Illinois, the highest State Court in Illinois, denied Petitioner leave to appeal the decision of the Appellate Court. In the Appellate Court's opinion, the Court found that the Petitioner had waived the issue of Judge Holzer's and Nelson's conflict of interests and decided not to rule on the merits of that issue. In so ruling, the Appellate Court never once made any reference to this Court's ruling in *Aetna Life Insurance Co. v. Lavoie*, ____ U.S. ____, 106 S.Ct. 1580 (1986) which was decided one year earlier.

PROCEEDINGS BELOW

The instant case first arose in the Circuit Court of Cook County as an interpleader action to determine the provisions of a trust that was being co-administered by both the Petitioner and Continental. After Judge Holzer ruled against the Petitioner and appointed a guardian *ad litem*, two separate appeals of those issues were prosecuted through the Appellate Court.

After discovering Judge Holzer's and Nelson's apparent conflicts of interest with Continental, Petitioner again moved the Circuit Court of Cook County, to vacate Judge Holzer's previous orders and fee awards. Judge Marovich denied Petitioner's motion and Petitioner appealed that ruling to the Illinois Appellate Court.

The Illinois Appellate Court affirmed the Circuit Court's rulings, (154 Ill. App. 3d 450, 507 N.E.2d 58) and the Illinois Supreme Court denied Petitioner's leave to appeal the Appellate Court's ruling. (116 Ill. 2d 550). The instant case now appears before this Court where Petitioner is praying that a writ be issued so that the important issues raised in this petition may be reviewed.

REASONS FOR GRANTING THE WRIT

THE ILLINOIS APPELLATE COURTS HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Decision Below Adversely Impacts Upon Petitioner's Fourteenth Amendment Due Process Rights.

One of the greatest benefits of living in a free, democratic society is the security of knowing that if a person has a legal problem that it can be resolved in the open forum of a court of law. Litigant's disagreements are settled upon the weight and substance of their evidence and not on any *ex parte*, extra-judicial, outcome determination bases. When a cause of action is resolved without regard to the evidence but instead for other, perhaps improper, reasons, then the sacrosanct right to due process of law is lost. These due process guarantees are applicable to the States through the Fourteenth Amendment.

In the instant case, Petitioner maintains that the failure of the trial court, the bank or the guardian *ad litem* to reveal any possible or potential conflicts of interest to the Petitioner prior to any action on the merits effectively denied Petitioner's right to due process of law.

Further, Petitioner asserts that this failure to disclose resulted potentially in a "sham" proceeding where the results may have been determined prior to the presentation of any evidence. The central issue is whether the Respondents' failure to disclose a potential conflict of interest denied Petitioner the right to present his case to an impartial trier of fact and as a result, also denied Petitioner due process of law.

Under Illinois law, attorneys, judges and fiduciaries are duty bound to disclose any possible conflicts of interest to their clients or their litigants. Ill. Rev. Stat. 1985, Ch. 110A, Canon 5-101(a), Canon 7-110(a), Canon 9; Ch. 110A, pars. 61, 66, and 67; Ch. 17, par. 1565 and *In re Estate of Swiecki*, 106 Ill. 2d 111, 118-119, 477 N.E.2d 488, 490-491 (1st Dist. 1985); *see also Allstate Insurance Co. v. Keller*, 17 Ill. App. 2d 44, 52, 149 N.E.2d 482, 486 (1st Dist. 1958). Such a duty to disclose is imposing a potentially unfair advantage over another.

Prior to the Illinois Appellate Court's ruling in *Continental Illinois National Bank and Trust Company of Chicago v. Marshall Spiegel*, 154 Ill. App. 3d 450, 507 N.E.2d 58 (1st Dist. 1987), this Court ruled on a similar issue in *Aetna Life Insurance v. Lavoie*, ____ U.S. ____, 106 S.Ct. 1580 (1986). In *Lavoie*, this Court was confronted with the issue of whether a due process violation presented itself where an appellate judge did not disqualify himself even though he had an interest that was "direct, personal, substantial, [and] pecuniary", as well as adverse to the litigants before the court. *Id.* at 106 S.Ct. at 1586.

In *Lavoie*, this Court held that the judge's opinion "had the clear and immediate effect of enhancing both the legal status and settlement value of his own case." *Id.* The Court further found that when the particular justice made his decision, "he acted as 'a judge in his own case.' " *Id.*

This Court then found that the particular justice violated the appellant's due process rights. In so ruling, the Court stated that,

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation . . . to the average [judge] . . . [to] lead him to not hold the balance nice, clear and true.'. . . The Due Process Clause 'may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." ' *Id.* 106 S.Ct. at 1587.

In the instant case, justice did not even satisfy the appearance of justice. As this Court is aware, Judge Holzer, the original Circuit Court judge was convicted in federal court of soliciting money from receivers, lawyers and appointed guardians *ad litem. U.S. v. Holzer*, 816 F.2d 304 (7th Cir. 1987), *vacated and remanded*, 108 S.Ct. 53 (1987). The potential conflicts of interest presented in the instant case—judge and Continental; Nelson and Continental and perhaps even Nelson and the judge—have been shown to be more real than illusory.

A judge that has a loan with a bank can undoubtedly use his influence over a pending case to forestall foreclosure or delay requests for late payments. These benefits can be construed as pecuniary in nature. However, even if nonpecuniary, the conflict of interest still violates due process.

As Justice Brennan noted in his concurring opinion in *Lavoie*,

> Nonpecuniary interests . . . have been found to require recusal as a matter of due process. . . . Moreover, . . . an interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding. . . . [T]he interests which trigger due process condemnation 'cannot be defined with precision.' *Id.* 106 S.Ct. at 1589-90.

The rationale in *Lavoie* simply follows a long line of cases of this Court which have protected the right to a fair trial from the uneven hands of a biased juror. *See also In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972).

In the instant case, the failure of the trial court to disclose his loan with Continental and its inherent conflict of interest violated Petitioner's due process rights.

Equally violative of the Petitioner's rights was the appointment of a guardian *ad litem* who also had an outstanding loan with Continental. Nelson's appointment presented conflicts of interest between Continental and himself and the unborn heirs of Petitioner and himself. Nelson could not serve two masters and, like the judge, his nonpecuniary stakes are so obvious that his conflict with Continental should have been disclosed. What unfolded here before the Petitioner was a judge who was indebted to Continental ruling adversely on the merits of his claim and appointing a favored guardian who also was indebted to Continental himself. All in all, based on the barest reading of the facts, the deck was stacked against the Petitioner. The only solution would have been full disclosure of all the parties interests. In not doing so, the Petitioner's due process rights were violated. The denial of rehearings on the merits of the recusal issue and the

vacating of Judge Holzer's orders by Judge Marovich, the Illinois Appellate Court denied Petitioner his right to due process of the law as guaranteed by the Fourteenth Amendment.

Two related matters that this Court may consider in its decision as to whether to grant this petition are waiver and whether the granting of the writ would lead to a large amount of litigation in this area. As to the issue of waiver, such an egregious violation of due process should never be waived. The Illinois Appellate Court's findings that the issue of whether a Judge like Judge Holzer should have notified counsel of a conflict of interest, was waived is clearly erroneous. A person "is entitled to a neutral and detached judge in the first instance." *Ward, supra,* 409 U.S. at 61. Such a fundamental right to a fair trial should not be subject to waiver rules.

The second point is whether the "litigation floodgates" would be opened if this Court granted Certiorari. It seems unlikely under the facts of the instant case that much litigation would follow the granting of certiorari. This case presents a real conflict between a party and the Court. This case is limited to the facts presented here, and any ruling by this Court could certainly limit this case to its facts.

Finally, the Constitution dictates that a "fair trial in a fair tribunal is a basic requirement of due process." *Murchison, supra,* 349 U.S. at 136.

For the reasons stated above, the Illinois Appellate Court's decisions in the instant case conflict with the clearly articulated precedent of this Court in *Lavoie, supra.*

As such, Petitioner would now request that this Court grant his writ.

B. The Awarding Of Guardian *Ad Litem* Fees To Nelson Without Disclosing Any Potential Conflict Of Interest Was An Unconstitutional Taking Of Petitioner's Property Without Due Process Of Law.

As noted above, the procedures undertaken in the instant case violated the Petitioner's due process rights. The Due Process Clause provides:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const., Amend. 14.

In construing this clause, this Court in *Carey v. Piphus*, 435 U.S. 247, 259-260 (1978) stated the following:

> [The Due Process] Clause 'raises no impenetrable barrier to the taking of a person's possessions,' or liberty or life. . . . Procedural due process rules are meant to protect persons not from the deprivation but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that 'procedural due process rules are shaped by the risk of error inherent in the truth finding process . . .' . . . Such rules 'minimize substantively unfair or mistaken deprivations of' life, liberty or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.

In the same vein, this Court earlier found in *Missouri Pacific Railroad Co. v. Missouri*, 164 U.S. 403, 17 S.Ct. 130 (1986) that, "[t]he taking by a state of the private property of one person . . . without the owner's consent, for the private use of another, is not due process of law." *Id.* 164 U.S. at 417.

In the instant case, Judge Holzer appointed Nelson as the guardian *ad litem* even though Holzer and Nelson both had indebtedness to Continental. Pursuant to Illinois Revised Statutes Chapter 110, paragraph 2-501, Holzer

paid Nelson fees for his advocacy of the interests of the unborn of the Petitioner. These payments unjustifiably deprived Petitioner of property without due process of law for two reasons.

First, the conflicts of interest noted above raises serious questions concerning the fairness of Nelson's appointment. Under the statute, the guardian must be disinterested. Here, Nelson clearly had an interest which was adverse to the Petitioner's unborn children and which should have been disclosed. Judge Holzer's failure to recuse himself was compounded by his appointment of Nelson and his subsequent payment of fees to an interested party. For all of the same reasons stated in Section A above, the effect of the initial due process wrong ended in the unjustified awarding of fees from the Petitioner to Nelson. Such awards by Judge Holzer constitute takings without due process of law.

Secondly, the awarding of fees to Nelson to prosecute his appeals on the issue of his conflict of interest is also an unconstitutional taking of Petitioner's property within the Due Process Clause because it goes beyond the remuneration set by statute and effectively penalizes Petitioner for his resorting to legal processes in order to rectify the initial due process violation, noted above. As such, the payment of fees to Nelson for his costs that were unrelated to his position as guardian do not satisfy the due process guarantees of the Fourteenth Amendment and are not covered by the specific statutory language contained in the statute. Ill. Rev. Stat., 1981, Ch. 110, par. 2-507. Therefore, the awarding of fees to Nelson are a taking of property without due process of law. The Illinois Circuit Court's and the Illinois Appellate Courts' orders upholding Nelson's fees are contrary to the precedent of this Court and therefore should be reviewed.

C. The Illinois Statute Allowing The Appointment Of A Guardian For Persons Not In Being Is Unconstitutional Because It Is Overbroad And Lacks A Rational Basis In Law.

One of Judge Holzer's orders was to appoint Nelson as a guardian *ad litem* to represent the unborn beneficiaries pursuant to Illinois Revised Statute, 1987, Chapter 110, paragraph 2-501. The Illinois statutory scheme is unconstitutional because it is overbroad and lacks any rational basis in the promotion of the state's regulation of trusts. Undoubtedly, the state has an interest in the effective, honest and proper administration of trusts. In some instances it may be appropriate for the state to protect the interests of unborn beneficiaries. However, the Illinois statute allows a judge to appoint a guardian *ad litem* in any case where the court deems "it necessary for the proper and complete determination of such cause." Ill. Rev. Stat. 1987, Ch. 110, par. 2-501. This unfettered discretion is too broad because it allows a judge like Judge Holzer to appoint a guardian *ad litem* in any case he desires. Judge Holzer's unfortunate conviction supports the fact that this statute is overbroad and is not narrowly tailored to protect the Petitioner's due process rights. Instead, this statute authorizes the awarding of fees to a guardian of the unborn even though that guardian may be unnecessary. Simply stated, the statute does not provide for any protection against the unnecessary and wrongful appointment of a guardian. The statute should be more narrowly crafted to more specifically define the need for the guardian. Without such a need, the appointment is unnecessary.

In the instant case, the rights of the unborn could have been protected by either of the trustees, since the trustees are under a fiduciary duty to preserve the terms of the trust. Without any provisions allowing the trustee to

contest the absolutely discretionary appointment, the statute simply is not narrowly tailored enough to promote the state's interest which not interfering with the Petitioner's rights.

It is apparent from the rulings pertaining to the questions presented in this case that the Illinois statute gives priority to the non-existent (who are only given the benefit of remainderman interest in this trust) over that of the living and the conceived but unborn. Application of the Illinois statute is outmoded and inconsistent with present law which is restrained in its protection of the existing but unborn and extends protection to those who are not in existence and may never come into existence.

The grantor of this trust never gave priority to the contingent beneficial interest over the primary beneficial interest of Petitioner. Even if the grantor specifically stated that the primary beneficial interest should always outweigh the interests of the contingent beneficiaries the current Illinois statute permits the appointment of a guardian *ad litem* ignoring the intentions of the grantor.

Therefore, Petitioner prays that this Court grant his writ to determine the important question of whether the overbreadth of this statute that grants such substantial rights to the unborn is unconstitutional. For the reasons stated above, this Court should grant the Petitioner's writ so that these important issues can be reviewed.

CONCLUSION

The decision below is in direct conflict with this Court's well established precedents. To allow this decision to remain would mock the public's belief in a fair trial. The due process violation in this case is substantial and has potentially far reaching effects on the parties. It is absolutely essential to the fair and honest administration of justice that the Illinois Appellate Courts' decisions in this case be reviewed. Petitioner, therefore, respectfully requests that this petition for a writ of certiorari to the Supreme Court of Illinois be granted.

Respectfully submitted,

MARSHALL SPIEGEL
5701 North Sheridan Road
Chicago, Illinois 60660
(312) 878-0993

Pro Se Petitioner

APPENDIX

[Filed March 18, 1987]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 86-842

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST CO. OF CHICAGO, a national bank,

Plaintiff-Appellee,

v.

MARSHALL C. SPIEGEL,

Defendant-Appellant,

LEONARD A. NELSON,

Appellee.

On Appeal from the Circuit Court of Cook County
Honorable George N. Marovich, Presiding

PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Marshall Spiegel appeals from an order of the trial court awarding appellee, attorney Leonard Nelson, fees and costs in the amount of $4,065.90. The award was granted for Nelson's work in a previous appeal in which Spiegel challenged, among other things, an earlier fee award for Nelson's services as guardian *ad litem* of the unborn beneficiaries of the Oscar Spiegel Trust. Spiegel contends that

the second award of fees was improper because Nelson had an undisclosed conflict of interest, and because Nelson was simply acting to protect his earlier award of fees and was not benefiting the unborn beneficiaries.

This is the third appeal to this court arising out of this cause of action. The Oscar Spiegel Insurance Trust was created in 1972 and Continental Bank was named as the corporate trustee of the trust. Marshall Spiegel was the sole beneficiary and became co-trustee upon reaching the age of 25 in 1981. Upon becoming the co-trustee, Spiegel attempted to remove Continental as trustee and demanded that the trust assets be turned over to him. Continental was allowed to interplead seeking judicial construction of the trust and claiming that the trust required Continental to turn the assets over to a succeeding corporate trustee. On Continental's motion, the trial court judge, Judge Reginald Holzer, appointed a guardian *ad litem* to represent the interests of Spiegel's unborn children. Nelson was later appointed as successor guardian to represent these interests.

On Continental's interpleader, the trial court ruled that the trust required appointment of a successor corporate trustee. The court also awarded Nelson's predecessor as guardian fees and costs in the amount of $4,787.50. Spiegel appealed the rulings and on December 7, 1983, in a Rule 23 order, we affirmed both rulings of the trial court.

On remand from the first appeal, the trial court granted Nelson fees for work done on the appeal. Spiegel appealed from this award of fees and on April 10, 1985, in another Rule 23 order, we affirmed the award of fees to Nelson. Shortly after the second appeal was decided, Judge Holzer was indicted and was no longer assigned to the matter.

On December 10, 1985, Nelson filed a petition for additional fees for work done on the second appeal. Spiegel objected to Nelson's petition for fees on the grounds that it had just been learned that Nelson was indebted to Continental and because of this undisclosed conflict of interest, Nelson was not entitled to serve as guardian. Spiegel also

moved to vacate all of the orders which had been entered by Judge Holzer on the grounds that the judge also had outstanding loans from Continental which had not been disclosed by the judge or Continental, and that Judge Holzer should have recused himself from the case.

On January 24, 1986, the judge assigned to the case granted additional fees to Nelson. On March 11, the trial court denied Spiegel's motion to vacate all of Judge Holzer's orders. On Spiegel's motion for reconsideration of the order as to Nelson's fees, the trial court confirmed its intent to assess the fees against Spiegel personally. Spiegel filed a timely notice of appeal challenging both the award of fees to Nelson and the denial of the motion to vacate Judge Holzer's orders.

At appellee's request, this court denied Spiegel's motion for leave to withdraw and voluntarily dismiss from this appeal that part of the trial court's order refusing to vacate the orders entered by Judge Holzer. In his opening brief, Spiegel expressly stated that he wished to withdraw that part of his appeal and made no argument regarding the orders entered by Judge Holzer. In his reply brief, however, Spiegel challenges the trial court's denial of his motion to vacate Judge Holzer's orders. Consistent with Supreme Court Rule 341 and the cases interpreting this rule, any points not argued by appellant in the opening brief are waived and shall not be raised in the reply brief, at oral argument, or on petition for rehearing. (87 Ill.2d R. 341(e)(f); *Coons v. Wilder* (1981), 93 Ill. App.3d 127, 416 N.E.2d 785.) We recognize that this waiver rule is not a limit on our jurisdiction. However, any exception to the rule would be inappropriate in a case such as this, where Spiegel, by filing a motion to dismiss this portion of the appeal and by not raising the issue in his opening brief, has chosen not to address the issue on appeal. We therefore hold that Spiegel's argument challenging the trial court's refusal to vacate all orders entered by Judge Holzer, argued for the first time in Spiegel's reply brief, is waived.

To reach Spiegel's contention regarding the award of fees to Nelson, we find Nelson's argument that Spiegel waived appeal of this issue to be without merit. It is clear that Spiegel intended to challenge Nelson's right to fees. Spiegel filed an objection to Nelson's petition for fees and objected to the trial court regarding Nelson's right to fees during a hearing on Nelson's petition and Spiegel's motion to vacate all previous orders.

Spiegel contends that any award of fees to Nelson should be vacated because of Nelson's failure to disclose a conflict of interest. Spiegel maintains that because Nelson had an outstanding loan from Continental, he could not adequately represent the interests of the unborn beneficiaries. In our estimation, Spiegel has not demonstrated the existence of an adversarial or conflicting nature in the relationship between Continental and Nelson or the unborn heirs. Furthermore, the alleged conflict between the interests of Nelson and Continental are speculative at best due to the unrelated nature of the transactions involved. Nelson simply had an outstanding mortgage from Continental, a major participant in the highly regulated practice of lending. There is no evidence of any relation between this mortgage and the practices of Continental's Trust Department. Any possible conflict would be so far removed from the issues in this case that it cannot require disqualification of Nelson as guardian *ad litem*. We fail to see how the exercise of Nelson's professional judgment would be impaired because of his loan from Continental. In sum, Spiegel has failed to demonstrate how Nelson's indebtedness is a conflict of interest or breach of fiduciary duty which would disqualify him from serving as guardian *ad litem*.

Spiegel next contends that Nelson's award of fees for his work in the second appeal was improper since this work consisted only of defending his own attorney fees arising out of the previous appeal. Spiegel concedes that by statute, the court may properly award fees for services as guardian *ad litem*, but claims that since Nelson was simply defending a previous court award of fees, and

was not providing any service for the unborn heirs, he is not entitled to the subsequent award for such services.

As Spiegel correctly notes, Nelson's right to fees cannot be established by *res judicata* since we have not ruled on Nelson's right to fees for the second appeal and Spiegel raises the new issue of an alleged conflict of interest. Nevertheless, we believe that Nelson is entitled to fees for the services he rendered. Both of our previous decisions in this cause affirmed awards of fees to either Nelson or his predecessor as guardian *ad litem*. In the first appeal we relied on statute, Ill. Rev. Stat. 1981, ch. 110, par. 2-501, to uphold the award of fees to Nelson's predecessor for defending the interests of unborn beneficiaries. We also noted that the award of fees to the guardian is a matter of discretion for the trial court and will not be disturbed absent an abuse of that discretion. In the second appeal, we found that the trial court's award of fees and costs to Nelson for services rendered in the first appeal was proper. Nelson now seeks fees for the services rendered in that appeal and we similarly find that Nelson is entitled to such fees.

It is irrelevant that at the time of the second appeal, Nelson had been relieved of his duties as guardian *ad litem*. Nelson was still entitled to protect the fees that had previously been awarded him by the trial court, for services rendered when he was guardian.

Spiegel also claims that Nelson should not be allowed fees since he provided no additional benefit for the unborn beneficiaries in the second appeal, and he was only acting to settle a personal claim with Spiegel. Review of our decision in the second appeal reveals that in addition to contesting the fees awarded to Nelson for work in the first appeal, Spiegel raised other issues. He challenged the propriety of Nelson's appointment as guardian. Spiegel maintained that the trial court was constrained to appoint a corporate trustee to represent the unborn heirs pursuant to the trust agreement. We disposed of this argument since the court's power to appoint a guardian was derived

not from the trust agreement, but from the statute. The second appeal did not only contest Nelson's award of fees. Rather, Nelson was required to defend his appointment, as well as the other holdings of the first appeal, for the benefit of the unborn beneficiaries.

Spiegel also argues that the fees awarded to Nelson are better characterized as attorney fees than guardian *ad litem* fees and therefore, are not recoverable. In support of this contention, Spiegel cites the cases of *Chamness v. Dawson* (1964), 51 Ill. App.2d 221, 201 N.E.2d 257, and *Baughman v. Baughman* (1919), 215 Ill. App. 620, 119 N.E. 49. In *Chamness*, the court held that the trial court should not have allowed guardian *ad litem* fees as costs in the cause since the fees were actually solicitor's fees and not within the court's power to tax as costs. There, an attorney previously appointed as guardian *ad litem* for a minor defendant, appeared for defendant in the appeal of a personal injury action. Here, Nelson's only purpose was to represent the unknown heirs to the trust.

Similarly, the *Baughman* court held that where it was impossible to distinguish between solicitor's fees and guardian *ad litem* fees, it was improper to tax any fees as costs. In *Baughman*, as in *Chamness*, it was clear that the attorney served as a solicitor for the minor as well as guardian *ad litem*. In the present case, Nelson served only as guardian *ad litem* for the unborn beneficiaries and then was required to act as an attorney simply to protect the fees previously awarded by the court for his guardian services.

Spiegel finally contends that it was improper to assess the fees against him personally as opposed to charging the income of the trust. The record indicates that the original order granting fees to Nelson assessed the fees against the trust. Spiegel then filed a motion for reconsideration and expressly asked to have the order changed to reflect the intention of the trial court as to the source of the fees. The court acted upon Spiegel's request and he cannot now be heard to challenge this order, especial-

ly in light of the fact that this issue too was not raised by Spiegel until submission of his reply brief.

We therefore hold that the original award of fees was authorized by statute. The subsequent awards, those upheld in the second appeal and those being affirmed by this opinion, were both guardian *ad litem* fees incurred to protect the unborn heirs and fees generated to protect Nelson's earlier court awards. We find no reason to require Nelson to pay his own fees as the result of these appeals. A holding to the contrary would have the effect of reducing the original award to which Nelson is entitled, by requiring him to pay out of his pocket to protect such an award. Such a result would be inequitable and we therefore uphold the trial court's award of fees to Nelson, to be paid by Spiegel personally.

For the foregoing reasons, the judgment of the circuit court of Cook County awarding fees to Leonard Nelson and denying Marshall Spiegel's motion to vacate all orders entered by Judge Holzer in this case is affirmed.

Judgment affirmed.

RIZZI and WHITE, J.J., concur.

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
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October 7, 1987

Ms. Joan Emery-Mincer
Schuyler, Roche & Zwirner
3100 Prudential Plaza
Chicago, IL 60601

No. 65142 – Continental Illinois National Bank & Trust Co. of Chicago, etc., et al., respondents, v. Marshall C. Spiegel, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1987.

SUPREME COURT OF THE UNITED STATES

No. A-492

MARSHALL C. SPIEGEL
Applicant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK
& TRUST CO. OF CHICAGO, ET AL.

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 5, 1988.

s/ JOHN PAUL STEVENS
Associate Justice of the Supreme
Court of the United States

Dated this 24th day of December, 1987.

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-1879

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD J. HOLZER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 CR 287—**Prentice H. Marshall,** *Judge.*

ARGUED DECEMBER 8, 1986—DECIDED APRIL 3, 1987

Before CUMMINGS and POSNER, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* A federal jury found Reginald Holzer, a former Cook County circuit judge (that is, a trial judge in Cook County's court of general jurisdiction), guilty of mail fraud, 18 U.S.C. § 1341, extortion, 18 U.S.C. § 1951 (the Hobbs Act), and violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962. He was sentenced to a total of 18 years in prison, and appeals. He raises a variety of grounds, but most are either frivolous or foreclosed by previous decisions. The only issues warranting discussion are whether Holzer's conduct was fraudulent within the meaning of the mail-fraud statute and extortionate within the meaning of the Hobbs Act.

The previous prosecutions resulting from the "Greylord" investigation have involved the traffic and misdemeanor divisions of the Cook County Circuit Court, illustrative decisions being *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986), and *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). This is the first case to involve the law and chancery divisions. Between 1968 and 1978 Holzer was assigned to the law division, which handles mainly personal-injury suits. Between 1978 and his indictment in 1985, he was assigned to the chancery division, which hears equity suits. While in the law division and then the chancery division Holzer repeatedly asked lawyers who were representing parties in matters over which he was presiding, and (in the chancery division) equity receivers appointed by him, for help in getting bank loans to shore up his precarious finances. Construing the facts as favorably to the government as the record permits, which we must do in view of the jury's verdict, we shall now describe the transactions on which Holzer's conviction is based.

Gerald Morris, a personal-injury lawyer, was summoned to Holzer's chambers in 1972, shortly after a block of 22 cases in which Morris's firm represented the plaintiffs had been reassigned to Holzer. Holzer told Morris that he had financial problems and had to borrow five to ten thousand dollars right away. Although Holzer had known Morris for more than 20 years, he had never before asked Morris for a loan. Morris and his partner arranged for a relative to lend Holzer $3,500. They gave the relative the money needed for the loan so that he wouldn't be out of pocket himself. The following year, after another block reassignment of Morris's cases to Holzer, Holzer asked Morris to arrange another loan, even though Holzer had not paid any interest, or repaid any principal, on the first one. A $5,000 loan, similar to the previous one, was made. Neither loan has been repaid. At Holzer's request, Morris later arranged for $25,000 in bank loans to Holzer, which Morris's law firm guaranteed.

In 1977, Fred Lane, who was representing a party in a case pending before Holzer, signed a check for $2,500 made out to Holzer. At Holzer's request, Lane's secretary used the check to buy a cashier's check payable to a bank in which Holzer had an account. The check was entered in the law firm's loan account, but there were no formal loan papers and the "loan" has never been repaid.

Between 1978 and 1983, Holzer borrowed $25,000 from Ernest Worsek, whom Holzer appointed to many receiverships during this period. Worsek also arranged a $10,000 loan from his friend Zilka to Holzer, gave Holzer $500 in department store gift certificates, and bought a large life insurance policy from Holzer's wife, an insurance agent. The loans were all made at Holzer's request. Worsek (who had to borrow money in order to fund them) complied with the requests only because he feared losing the receiverships, which generated almost half his total income. In 1983 Worsek told Holzer that he would no longer make the payments on the Zilka loan, as he had been doing—whereupon Holzer stopped assigning receiverships to Worsek. Holzer repaid only $7,000 of the two loans.

In 1984 Worsek told Holzer that he had been interviewed by FBI agents. The two met at Holzer's request in another judge's jury room. At Holzer's suggestion they communicated in writing at this meeting, and when the meeting was over Holzer tore up the notes and flushed them down the toilet. After the meeting Holzer again began appointing Worsek to receiverships—nine altogether in the balance of 1984.

In 1979 Holzer summoned Russell Topper, who represented plaintiffs seeking $2 million in damages in a case pending before Holzer, to his chambers, told Topper he was in desperate need of money, and asked him for help in getting an unsecured $10,000 bank loan. When the bank that Topper contacted refused to make Holzer an unsecured loan, Topper purchased a $10,000 cashier's check payable to Holzer and gave the check to him. Although Holzer promised to repay the loan within a couple of

months, he did not sign a promissory note or give Topper a copy of his financial statement, and there was no discussion of interest on the loan. Several months later, on the eve of trial, Topper came to Holzer, told him that the $10,000 had been Topper's own money, and suggested that Holzer recuse himself. They agreed that before he did so they would try to settle the case. When, notwithstanding Holzer's efforts, settlement negotiations fell through, Holzer recused himself. The "loan" was never repaid.

Also in 1979 Holzer summoned to his chambers Nathan Powell, who represented the defendant in a suit pending before Holzer, and told him he needed a $10,000 loan. Powell said that without security Holzer would not be able to get a loan. Holzer pressed him to do what he could. Although Powell had known Holzer for many years, this was the first time that Holzer had asked him for help with a loan. After getting his client to put up collateral for a $10,000 bank loan to Holzer, Powell told Holzer to call an officer of the bank named Maram. Powell told Holzer that someone had put up collateral for the loan but didn't tell him who. Several months earlier Maram had rejected Holzer's application for a $10,000 unsecured loan, but this time, with the loan secured, the application was approved.

In 1980 two lawyers with cases before Holzer, Neistein and Richman, made payments at Holzer's request on a bank loan which they had arranged for him and on which he was delinquent. The following year Becker, a lawyer with a case before Holzer, and Green, Becker's client, arranged at Holzer's request for a bank loan of $24,000 to Holzer, covertly funded by a bank that Green owned. Although Holzer was not told about Green's help in getting the money for the loan, some of the payment notices that the lending bank sent to Holzer showed Green's name typed in the place for the borrower and then crossed out (but still readable). Also that year, Holzer asked Karzov, whom he had appointed to be the attorney for one of Worsek's receiverships, for a $1,000 cash loan. Karzov gave him the money. Half the loan was repaid after the FBI

began its investigation of Holzer; the other half has never been repaid.

In 1982 Stanley Lieberman sought receivership appointments from Holzer, and in 1983 received an appointment. After the two had lunch together one day, they repaired to Holzer's chambers where Holzer told Lieberman that he was in extreme financial difficulty and needed a loan of $25,000 to $30,000 (apparently to repay the bank loan he had gotten through Becker and Green). After Holzer "struck out" at two downtown banks (one of which wrote him that it was rejecting his loan application because of his high ratio of debt to equity), Lieberman at Holzer's request approached a suburban bank with which Lieberman did business and asked it to make a loan to Holzer. Lieberman agreed to guarantee the loan and told the bank not to tell Holzer about the guarantee. The loan was made and later Holzer appointed Lieberman to another receivership.

On twelve occasions between 1979 and 1983, Holzer appointed Burton Schatz as an attorney for a receiver (usually Worsek) or as a guardian *ad litem*, and during this period Schatz wrote checks to Holzer totaling $18,300. This was about $10,000 less than the fees Holzer had awarded him for his services in these appointments.

Rule 68 of the rules of the Illinois Supreme Court requires each circuit judge to file an annual ethics statement. In a confidential portion of the statement the judge is required to list "creditors to whom amounts in excess of $1,000 are owed by me," and also any potential conflicts of interest. Until 1985, which was after Holzer became aware of the FBI's investigation of his affairs, his statement listed as creditors none of the persons we have mentioned from whom or through whom he had obtained loans. The supplemental statements that he filed in 1985 were incomplete. And in response to questionnaires submitted to judicial candidates by a citizens' group, Holzer when he was running for election as circuit judge in 1974 and for reelection in 1982 had stated that he accepted "no gifts at all" and "absolutely no contributions, gifts, or favors of any kind at any time."

The question is whether the facts we have recited establish fraud within the meaning of the mail-fraud statute and extortion within the meaning of the Hobbs Act. In arguing that they do not, Holzer asks us to accept his characterization of the facts: He was hard up for money and asked assistance of anyone he thought might be able to introduce him to a bank, and naturally the persons solicited included lawyers and naturally some of them had matters before him; he had no idea that the lawyers were guaranteeing the loans they helped him to obtain from banks, and he never threatened the lawyers with adverse rulings if they failed to help him and never promised them favorable rulings if they did help him; nor were any of his rulings influenced by the loans; nor, finally, did it occur to him that he had a duty to disclose these dealings to counsel, the state, or the public. Although this is a possible (but highly implausible) characterization of the facts, it is not one that the jury was required to accept. An alternative characterization, one that is both more plausible and fully supported by the evidence at the trial, is that Holzer over a period of many years used his public office to obtain money through deceit and extortion.

Fraud in its elementary common law sense of deceit—and this is one of the meanings that fraud bears in the statute, see *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985)—includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud. When a judge is busily soliciting loans from counsel to one party, and not telling the opposing counsel (let alone the public), he is concealing material information in violation of his fiduciary obligations.

The standard of materiality is an objective one; it does not reach every piece of information that a particular litigant might like to have about a judge. A judge need not disclose information that would not make a reasonable person think him incapable of presiding impartially in the

case. Thus he need not, in a case to which Sears Roebuck is a party, disclose that he is a customer of Sears; he need not, in a case involving the First National Bank, disclose that he has an account at the bank. *United States v. Gregory*, 508 F. Supp. 1218, 1220 (S.D. Ala. 1980), app. dismissed and mandamus denied, 656 F.2d 1132 (5th Cir. 1981). The facts of this case as the jury could reasonably have found them are dramatically different. Here is a man in desperate financial straits, unable to borrow through ordinary channels, who turns for help to people over whom he has power: lawyers in cases over which he is presiding and persons to whom he has the power to award lucrative receiverships and guardianships. When he asks them for help, either they lend their own money directly to him or, as if by magic, bank loans that he had tried and failed to get suddenly materialize. It is doubtful that these transactions should be called "loans." Out of some $200,000 in documented receipts from these sources, Holzer repaid almost nothing; and the evidence supports an inference that he never intended to repay the money in full, realizing that the lawyers and guarantors of the loans would never press him for repayment, because they would fear retribution—with reason, if one may judge from Worsek's fate after he stopped making payments on the Zilka loan. Most of the loans, indeed, seem to have been thinly disguised bribes. Several listed on a private record that Holzer kept of his personal debts were crossed out—without having been repaid.

The character of the "loans" has a twofold significance. First, it shows that these were not arms-length transactions (though the Illinois Supreme Court's Rule 68 requires disclosure even of arms-length loans). Neither party to an arms-length transaction is expected to show gratitude, or to feel a sense of residual obligation, to the other. A judge is not "grateful" to Sears Roebuck for selling him a lawnmower at the market price of lawnmowers. It is when the other party to the transaction is doing him a favor that an inference of gratitude, or an inference that a quid pro quo can be expected, may arise and make the

failure to disclose the transaction to counsel for the opposing litigant material.

Second, the systematic and long-continued receipt of bribes by a public official, coupled with active efforts to conceal the bribe-taking from the public and the authorities (as in Holzer's Rule 68 filings and his response to voter questionnaires), is fraud (again in its elementary sense of deceit, and quite possibly in other senses as well), even if it is the public rather than counsel that is being kept in the dark. It is irrelevant that, so far as appears, Holzer never ruled differently in a case because of a lawyer's willingness or unwillingness to make him a loan, so that his conduct caused no demonstrable loss either to a litigant or to the public at large. See, e.g., *United States v. Keane*, 522 F.2d 534, 541, 546 (7th Cir. 1975); *United States v. Lovett*, No. 85-2967, slip op. at 12 (7th Cir. Jan. 26, 1987); *United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1939). How can anyone prove how a judge would have ruled if he had not been bribed? And if it were necessary to show that the judge had ruled differently than he would have done if he had not been bribed, it would mean that a judge would not be committing fraud when he demanded and received equal bribes from both sides of a lawsuit. A system in which judges are paid by the parties rather than by the state does not inherently distort judgment; it is, indeed, the system used in arbitration, which is a type of adjudication, and it was also used in the judicial system of England until well into the nineteenth century. But the State of Illinois has decided that judges shall not be compensated out of fees paid by the litigants, and a judge who disregards this decision deprives the state of whatever benefits (what the cases call the public's "intangible rights") it hoped to obtain from the system of compensation that it did adopt. He also makes litigants pay double for judicial services—once in their taxes (which pay the judges' salaries), and the second time in fees paid directly to the judge. When, in addition, the judge conceals what he is doing, he commits fraud; for what he is concealing is clearly material information to his employer, the state.

United States v. Rabbitt, 583 F.2d 1014, 1024-26 (8th Cir. 1978), does not require a different conclusion. A state legislator received a secret commission from an architectural firm to help it get state contracts. Not only was there no evidence that his efforts on the firm's behalf caused any actual loss to the state, but the court was also not convinced that his conduct had deprived the state of its right to honesty and fairness in the performance of the defendant's official duties, because the contracts were awarded on a merit basis by officials over whom the defendant had no power. We very much doubt the soundness of this reasoning. The fact that the defendant did not control the award of contracts should not be decisive if his position as a state legislator gives his recommendations a weight independent of their intrinsic merit. But the case in any event is different from this one. Holzer received money from persons appearing before him in his official capacity rather than from persons having business before other judges or before the executive or legislative branches of state government. The Eighth Circuit upheld Rabbitt's conviction of mail fraud for peddling his influence to obtain legislation favorable to a trade association that had bribed him.

Holzer argues that he could not be deemed to have acted fraudulently when there was no clear-cut ethical rule prohibiting him from receiving loans from lawyers with business before him. This thrust is wide of the mark, since even if the receipt of the loans were not prohibited, the failure to disclose their receipt, at the very least to counsel opposing the lenders, would be fraudulent in the circumstances. But this point to one side, we do not agree that the absence of an explicit rule should make a difference. We do agree that the words "scheme or artifice to defraud" don't reach everything that might strike a court as unethical conduct or sharp dealing, despite broad language to this effect in cases that we criticized in *United States v. Dial*, *supra*, 757 F.2d at 170, including our own *United States v. Serlin*, 538 F.2d 737, 744 (7th Cir. 1976). The frequently quoted suggestion in *Gregory v. United*

States, 253 F.2d 104, 109 (5th Cir. 1958), that whatever is not a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society" is fraud (see, e.g., *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)) cannot have been intended, and must not be taken, literally. It is much too broad and, given the ease of satisfying the mailing requirement, illustrated by *United States v. Green*, 786 F.2d 247, 249-57 (7th Cir. 1986), would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute. However, as we emphasized in *Dial*, elaborate efforts at concealment—illustrated here by Holzer's clandestine meeting with Worsek after the FBI investigation began, by his failure to list the "loans" on his Rule 68 statement, and by his repeated public denials of receiving favors of any kind (which certainly included such questionable loans from counsel appearing before him)—are powerful evidence that a defendant's conduct violates an ethical standard well known to him and to the whole community, and not just something thought up after the fact by a perhaps overly sensitive federal judge. See 757 F.2d at 270; *United States v. Brown*, 540 F.2d 364, 375 (8th Cir. 1976).

We need not consider whether the receipt of bribes might be fraud under the mail-fraud statute if done openly. The legal meaning of "fraud" is not limited to deceit or misrepresentation; it includes overreaching, undue influence, and other forms of misconduct. There have been cases, like *United States v. Gorny*, 732 F.2d 597, 601-02 (7th Cir. 1984), where convictions of mail fraud based on bribe-taking were upheld without consideration of concealment. The issue is academic, since no public official in the United States takes bribes openly, but is in any event not one we need consider here, since the instructions made intent to deceive an element of the fraud with which Holzer was charged.

A law review note argues from the legislative history of the mail-fraud statute that Congress never intended

the statute to reach a case such as this where the public official does not obtain anything of value from the victims of the fraud—from litigants whose lawyers did not make loans to Holzer, or from the citizens of Illinois whose confidence in their government may have been undermined. Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562 (1980). The argument is repeated in a case pending in the Supreme Court. See Brief for Petitioner Gray in *McNally v. United States*, Nos. 86-234, 86-286, October Term 1986. The argument depends on the view that the meaning of fraud in the mail-fraud statute was frozen by the conception of fraud held by the framers of the statute when it was first passed back in the nineteenth century. This seems to us the opposite and equally untenable extreme from arguing that fraud is whatever strikes a judge as bad, but in any event the "intangible rights" concept that the argument attacks is too well established in the courts of appeals for us to disturb.

We turn to the issue of extortion, defined in the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right." 18 U.S.C. § 1951(b)(2). Holzer questions the sufficiency of the evidence to support an inference that the lawyers who made loans to him were acting out of fear.

Except in cases involving a threat, or actuality, of force or violence, the payment must be induced either by fear of what the payee might do if payment were not forthcoming, or by the defendant's office ("color of official right"). The two types of inducement (fear and office) should be distinguished. The first is based on fear of retribution by the official, wielding his official powers; the second is based on a hope of benefit from the exercise of those powers. The first covers cases of actual or implied threat to use (or not use) official powers to harm a person if he doesn't pay the official, and corresponds to the lay sense of "extortion"; the latter covers cases where bribes are

offered and accepted even without having been solicited. See *United States v. Braasch*, 505 F.2d 139, 150-51 and n. 7 (7th Cir. 1974). Both types of "extortion" were charged in this case, and proved. When a judge urgently and insistently asks a lawyer in a case before him for a loan, the request connotes an implied threat (or so a jury could reasonably conclude) to rule against the lawyer if he turns the judge down. It is irrelevant that the judge would not, and knows he would not, retaliate against the lawyer if the lawyer spurned his request, just as it is irrelevant in a robbery case that the robber would not in fact have pulled the trigger if his victim had refused to hand over the money. A threat is not a state of mind in the threatener; it is an appearance to the victim. A statement that a person is intended to and does understand to be a threat is a threat even if the person making it is bluffing. It is therefore enough that a reasonable jury could have found that Judge Holzer's requests for loans were intended to and did induce the persons to whom they were addressed to think that if they didn't comply they might be visited with subtle or not-so-subtle judicial retaliation. See *United States v. Crowley*, 504 F.2d 992, 995 n. 5 (7th Cir. 1974). It was not subtle in Worsek's case.

Some of the lawyers whom Holzer solicited had been acquaintances of his for many years, yet not until they had cases pending before him did he solicit their financial assistance. Worsek and Lieberman were serving as receivers, at his pleasure, when he solicited them. He made clear to many of the lawyers and receivers that he was in desperate straits. He could leave them to draw the natural inference that if they didn't play ball he might retaliate, as in fact he did retaliate against Worsek. They testified that that was precisely the inference they did draw. Holzer testified that he did not mean to convey any such impression, but the jury was not required to believe him. He is an intelligent man fully capable of understanding that the lawyers and receivers he was dealing with were digging into their own pockets to help him, out of fear of the financial and professional consequences if they

did not; and the jury was entitled to conclude that he deliberately took advantage of their fears to line his pockets. He was not the passive recipient of favors; he actively solicited them, using his office as the weapon, though except in the case of Worsek the weapon apparently remained sheathed.

It would not help Holzer even if he were the passive recipient of loans, pressed on him by lawyers eager to curry favor with him. Extortion "under color of official right" equals the knowing receipt of bribes; they need not be solicited. That at least is the view in this circuit. See *United States v. Murphy, supra*, 768 F.2d at 1530; *United States v. Blackwood*, 768 F.2d 131, 134 (7th 1985); *United States v. Schmidt*, 760 F.2d 828, 832 (7th Cir. 1985); *United States v. Price*, 617 F.2d 455, 458 (7th Cir. 1979). The Second Circuit has taken a different view, see *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc), but one we have declined to follow. In this circuit it is extortion if the official knows that the bribe, gift, or other favor is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe. There is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been pressed was the official passive (here he was hyperactive in the solicitation of bribes thinly disguised as loans). The issue was how the jury should be instructed. That issue is not presented here, since Holzer does not complain about the instructions.

The facts reveal and the jury found an appalling betrayal of the public trust. The evidence was ample, the instructions correct, the conduct of the trial fair, the sentence reasonable, and the judgment is

AFFIRMED.